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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 644

JAMES L. SKINNER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner herein prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals, for the Second Circuit, affirming the judgment of conviction had against petitioner in the District Court of the United States, Eastern District of New York on March 13, 1958. Petitioner was convicted under an amended Information filed by leave of the District Court on February 18, 1958 for the crimes of Possessing property, to wit, 20,000 pounds of sugar, intended for use in violation of Sections 5174(a), 5180, 5606 and 5216 of Chapter 51, Title 26, United States Code (26 USC 5686 (b). Petitioner was sentenced by the District Court to six months imprisonment. Petitioner was released on bail pending appeal to the Court of Appeals for the Second Circuit in the amount

of One Thousand ($1,000) Dollars. The Court of Appeals affirmed the conviction and wrote a *per curiam* opinion.

Official Reports of Opinions in Courts Below

Opinion by Judge Abruzzo on motion to suppress and return evidence illegally searched for and seized by federal agents. Not officially reported. See Appendix A.

Per curiam opinion of the Court of Appeals for the Second Circuit is reported in —— F. 2d ——. (Report not printed. See Appendix B.)

Grounds on Which the Jurisdiction of This Court Is Invoked

The date of the judgment of the Court of Appeals for the Second Circuit sought to be reviewed is December 8, 1959 and said judgment was entered December 8, 1959.

Petitioner respectfully submits that this Court has jurisdiction to entertain this petition for a writ of certiorari by virtue of Section 1257 (3), Title 28, United States Code and Rule 19, Revised Rules of the Supreme Court of the United States.

The Court of Appeals for the Second Circuit has decided a federal question under the Fourth Amendment of the Constitution of the United States and a federal question with respect to Rules 7(e) and 8(a) of the Rules of Criminal Procedure in a manner in conflict with the applicable decisions of the Supreme Court of the United States, and decisions of the Court of Appeals of Circuits other than the Second Circuit.

The time to file petition for writ of certiorari was extended to and including January 14, 1960 by Order of Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, dated the 5th day of January, 1960.

Questions Presented for Review

1. Did the District Court have the legal right to grant the United States Attorney leave to amend the original Information filed against petitioner that charged him with on or about August 23, 1956, within the Eastern District of New York Possessing Property, to wit, 20,000 pounds of sugar, with intent to use the said sugar in violation of Chapter 51, Title 26, United States Code (26 U.S.C. 5686 (b)), and file an Information charging that on or about the 23rd day of August, 1956, within the Eastern District of New York, the defendant, James L. Skinner (Petitioner), did have and possess property, to wit, 20,000 pounds of sugar, intended for use in violation of Sections 5174-(a), 5180, 5606 and 5216 of Chapter 51, Title 26, United States Code (26 U.S.C. 5686 (b), in violation of Rule 7 (e) Rules of Criminal Procedure, which amended Information charged four additional and different offenses, not charged in the original Information.

2. Did the District Court have the legal right to grant the United States Attorney leave to file the amended Information charging petitioner with the commission of four different offenses, to wit, (1) possessing property, 20,000 pounds of sugar intended for use in violation of Section 5174-(a); (2) possessing property, etc., intended for use in violating Section 5180; possessing property, etc., intended for use in violating Section 5606 and possessing property, etc., intended for use in violating Section 5216. (All sections contained in Chapter 51, Title 26, United States Code.)

3. Can petitioner be convicted of the offense of Possessing Property, to wit; 20,000 pounds of sugar on or about August 23, 1956 intended for use in violating Sections 5174-(a), 5180, 5606 and 5216 of Chapter 51, Title 26, United States Code when the aforesaid property was illegally seized by federal agents on September 7, 1956 by an illegal

search and when such search and seizure was legally declared by the District Court of the United States, Eastern District of New York (Abruzzo, J.) to be an illegal search and seizure after a hearing and an Order duly served upon the United States Attorney and filed in the District Court of the United States for the Eastern District of New York.

Constitutional Provisions and Rules of Criminal Evidence Involved. Rule 19, Revised Rules of the Supreme Court of the United States.

(Pertinent part)

Fourth Amendment of the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (Vol. 1, U.S.C. 1958 Ed., p. XLVI)

Rule 7. The Indictment and the Information.

> (e) Amendment of Information. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. (Vol. 4, 1958 Ed. U.S.C., p. 3414)

Rule 8. Joinder of Offenses and of Defendants.

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information

in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. (Vol. 4, 1958 Ed. U.S.C., p. 3415)

Rule 19, Revised Rules of the Supreme Court of The United States. (Pertinent Part)

1,(b) * * * or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Statement of the Case

Petitioner purchased 20,000 pounds of sugar on August 23, 1956 from the Arrow Trading Company, 1320—36th Street, Brooklyn, New York. Petitioner drove the truck containing the sugar to various places and on August 30, 1956 placed the truck containing the sugar and other articles in the COM Garage, located on 59th Street, near Bay Parkway, Brooklyn, N. Y. and rented storage space in such garage. On September 7th, 1956, agents of the Alcohol Tax Unit, Treasury Department of the United States, entered the aforesaid garage and seized and removed the Ford Truck, owned by petitioner, together with the 20,000 pounds of sugar that he had purchased August 23, 1956, and also various other articles contained in said truck. The federal agents did not have a warrant to

search the portion of the garage rented by petitioner where his property was stored.

Petitioner, by a series of motions made in the District Court of the United States, Eastern District of New York finally compelled the United States Government to commence a Libel action against the property seized and such action is still pending and is defended by petitioner.

Subsequently, and on or about May 23, 1957 petitioner was notified to appear before the United States Commissioner for the purpose of being arrested for some federal offense. He duly appeared and was placed under arrest and furnished bail and waived examination before such Commissioner. On or about May 29, 1957, an Information was filed in the District Court of the United States, Eastern District of New York charging petitioner with on or about August 23rd, 1956 in the Eastern District of New York possessing 20,000 pounds of sugar with intent to use the said sugar in violation of Chapter 51, Title 26, United States Code. (26 USC 5686 (b).) Issue was joined on the aforesaid information by a plea of not guilty by petitioner.

A motion was subsequently made to suppress and return the evidence seized by the federal agents on September 7, 1956 from the C O M Garage, wherein petitioner had rented space to store the automobile that contained the 20,000 pounds of sugar and other articles belonging to petitioner. After a hearing on such motion before Hon. Matthew T. Abruzzo, District Court Judge, Eastern District of New York, the motion was granted and an Order duly made and entered February 5, 1958, suppressing all evidence seized illegally by the federal agents on September 7, 1956. Judge Abruzzo did not order the property returned for the reason that the Libel action was still pending in the United States District Court, Eastern District of New York.

The criminal case was called for trial on February 18, 1958 before Judge Mortimer W. Byers, United States District Court, Eastern District of New York.

Petitioner waived a jury trial. He then made a motion to dismiss the Information on the ground that the Information did not state a crime, that it was vague and indefinite and that the Information charged petitioner with possession of the 20,000 pounds of sugar on or about August 23rd, 1956 with intent to use the said sugar in violation of Chapter 51 of Title 26, United States Code; that Chapter 51 comprises 693 numbered sections, some criminal offenses, some penalty sections. The Court (Byers, J.) denied the motion. Petitioner duly excepted.

The Court (Byers, J.) ruled that a defendant is entitled to know what specific provision of Chapter 51 he is charged with violating. Judge Byers further directed, over objection, that the Information be amended to specify the precise statute or regulation that the defendant (petitioner) is charged with violating.

The United States Attorney thereupon filed an amended Information which in substance charged petitioner with on or about August 23, 1956, in the Eastern District of New York with possessing property, to wit, 20,000 pounds of sugar intended for use in violation of Sections 5174-(a), 5180, 5606 and 5216 of Chapter 51, Title 26, United States Code, and in parenthesis (26 USC 5686 (b).) The United States Attorney then told the Court (Byers, J.) that the Information means that the defendant (petitioner) possessed that sugar intended for use in violation of those sections.

The amended Information consists of but one count.

Petitioner then moved to dismiss the amended Information on the ground that the Information charged more than one crime in one count, namely four different offenses; possession of the sugar intended for use in violation of Section 5174-(a), 5180, 5606 and 5216 of Chapter 51, Title 26, United States Code, in violation of Rule 8(a) Rules of Criminal Procedure. The Court (Byers, J.) denied the motion to dismiss the amended Information, stating that

the major violation is 5686(b) and the "details, the items, the Bill of Particulars, so to speak, consists in violations which are pointed out of the other Sections."

The Court then permitted the United States Attorney to adduce evidence to establish a violation of each of the four sections contained in the Amended Information, namely, Sections 5174(a), 5180, 5606 and 5216.

All of the aforesaid evidence was received over objection of petitioner, and exceptions taken.

On appeal from the judgment of conviction had against petitioner to the United States Court of Appeals for the Second Circuit, petitioner raised the aforesaid questions. The Court of Appeals, in the *Per Curiam* opinion, stated:

> "It is to be observed, however, that appellant was not charged with having violated any of the sections set forth in footnote 2, supra, but rather was charged with the possession of a single specified amount of sugar on a single specified date for an intended use which would violate several sections of Chapter 51 of the Internal Revenue Code. We hold that the amended information charged a single offense."

(Sections set forth in footnote 2, *supra*, of the *Per Curiam* opinions are Sections 5174-(a), 5180, 5606 and 5216 of Title 26 of the U. S. Code) (Footnote 2 also states:

> "The judgment of conviction stated that the sugar was intended for use in violation of Sections 5174-(a), 5180, 5606 and 5216 of Title 26, U. S. Code)."

By stipulation of the United States Attorney and the attorney for petitioner the record made before Judge Abruzzo is made part of the record of this trial. The Court (Byers, J.), accepted this stipulation.

Upon the hearing to suppress the evidence had before Judge Abruzzo, the United States Attorney called Joseph Krain, a partner in Arrow Trading Company, from whom

petitioner purchased the 20,000 pounds of sugar on August 23, 1956, Raymond J. Toussaint, Everett R. Phillips, Morris Turner and Michael LaPerch, all agents of the Alcohol Tax Unit of the Treasury Department of the United States. The petitioner, James L. Skinner, was the only witness called in support of the motion. Judge Abruzzo, after hearing all the evidence addduced by the Government and James L. Skinner, defendant, granted the motion to suppress the evidence.

Upon the trial in the District Court Judge Byers used the evidence of the agents of the Alcohol Tax Unit in arriving at the judgment of conviction. This is the very same evidence that was adduced by the Government on the hearing to suppress. Judge Abruzzo ruled, in granting the motion to suppress that the Government would have to establish "probable cause" and that the evidence of the federal agents did not establish probable cause, which would make legal the search and seizure of September 7, 1956.

The ruling of Judge Abruzzo that the Government failed to establish probable cause is *res judicata*. Judge Byers is bound by that ruling. The ruling of Judge Abruzzo is a adjudication of the facts or issues in question, the same facts and issues involved in the trial. The doctrine of *res judicata*, by which a fact or matter distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties is applicable to judgments in criminal jurisdiction. 147 ALR 992, 993.

The Court of Appeals, in the *per curiam* opinion states:

> "Appellant has pointed to no instance where evidence suppressed by Judge Abruzzo was used in appellant's trial."

Petitioner has pointed out in the brief submitted in the Court of Appeals that Judge Byers did use the evidence adduced upon the hearing of the motion to suppress before

Judge Abruzzo and quoted verbatim from the record of the trial:

> "The Court: Am I supposed to close my eyes to the fact that the man who acquired the sugar in July [sic] kept running it around, parking it at night, first in Staten Island, and then in somewhere else?" (July error: purchased sugar August 23, 1956.") (Trial Record: p. 165)

Basis for Federal Jurisdiction in Court of First Instance

The basis for federal jurisdiction in the United States District Court for the Eastern District of New York is the filing of the Information on or about May 29, 1957.

Argument Relied on for Allowance of Writ of Certiorari

Petitioner urges that this Court should grant a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit, affirming the judgment of conviction had March 13, 1958, District Court of the United States, Eastern District of New York upon the ground that the District Court violated rules 7(e) and 8(a) of the Rules of Criminal Procedure.

Rule 7(e) states that an amendment may be made to an Information if no additional or different offense is charged.

The United States Attorney took the position in the District Court that the original Information charged the offense of violation of Section 5686(b), Chapter 51, Title 26, United States Code. The United States Attorney stated at the trial in the District Court (verbatim):

> "Mr. Jaffin: Of course, the Government contends this section in and of itself constitutes a crime, namely, the possession of liquor or property intended, or pro-

vided it is to be used in violation of provisions of this Chapter." (Trial Record: p. 10)

The Court (Byers, J.) ruled that the defendant is entitled to know what specific provision of Chapter 51 he is charged with violating.

The Court then granted the United States Attorney the right to amend the Information. Petitioner objected, the Court overruled the objection. Petitioner excepted.

The granting to the United States Attorney the right to amend the Information is clearly error, and violates Rule 7(e), Rules of Criminal Procedure.

Petitioner contends that the Court (Byers, J.) committed error in denying the motion to dismiss the amended Information upon the grounds that such amended Information charges four specific and distinct offenses. It is contended that an Information that only charges a violation of Section 5686(b) viz.: possessing property would not charge a crime. Section 5686(b) must be charged in conjunction with some specific section or regulation of Chapter 51. The Government has the burden of proving beyond a reasonable doubt two things, (1) possession of the property (2) that it is intended for or has been used in violating some specific provision or regulation of Chapter 51. Here the Information charges possession with intent to use in violation of four separate and distinct offenses. The proof required to establish that petitioner possessed the property with intent to use the same in violation of Section 5174 is entirely different from the proof required to establish that petitioner possessed property intended for use in violating Sections 5180, 5606 and 5216. The same reasoning applies to Section 5180, 5606 and 5216.

The Court of Appeals for the Second Circuit, in the *per curiam* opinion states in Footnote 2:

"The judgment of conviction stated that the sugar was intended for use in violation of Sections 5174(a), 5180, 5606 and 5216 of Title 26 of the U. S. Code."

This contradicts that part of the opinion wherein the Court states:

> "It is to be observed, however, that appellant was not charged with having violated any of the sections set forth in footnote 2, supra, but rather was charged with the possession of a single specified amount of sugar on a single specified date for an intended use which would violate several sections of Chapter 51 of the Internal Revenue Code. We hold that the amended information charged a single offense."

The United States Attorney upon the trial took the position that the Information, as amended, charged petitioner with possessing the sugar intended for use in violations of Sections 5174 (a), 5180, 5606 and 5216. The Court (Byers, J.) stated that the amended Information charged a violation of Section 5686(b), Title 26, U.S.C. in that the sugar is alleged to have been possessed in violation of Sections 5174 (a), 5180, 5606 and 5216 of Chapter 51.

The Court of Appeals, in the *per curiam* opinion does not cite any cases in support of their holding and petitioner has not been able to find any case wherein the precise question has been decided under Section 5686(b).

Petitioner contends that a reading of Section 5316, Chapter 51, Title 26, USCA, leads to the conclusion that any violation of Section 5686(b) must also allege that the property (or liquor) is intended for use in violating some specific provision or regulation of Chapter 51 and that the separate offense may be united with Section 5686(b) in one count.

Section 5316, Chapter 51, Title 26, USCA, reads:

> "In any affidavit, Information or Indictment for the violation of this subchapter, or of Section 5686, separate offenses may be united in separate counts, and the defendant may be tried on all such offenses at

one trial and the penalty for all offenses may be imposed."

In *United States* v. *Cleveland*, D. C. Ala. 1922, 281 F. 249; at pages 251, 252, the Court said:

> "In reading this section I find authority for the indictment to contain as many separate counts as offenses may have been committed, but each offense should be charged in separate counts though they may all be tried at one time. This certainly gives no authority to write more than one offense in one count, but if the act is controlling requires a separate count for each offense."

In *United States* v. *Forys*, 113 Fed. Supp. 580, at page 582, the Court said:

> "* * * A reading of 26 USCA, Section 2707 (b) indicates that the failure to make a return and the failure to pay the tax are two separate and distinct offenses. They should not therefore be contained in a single count. Where one count alleges both, it becomes invalid for duplicity. Curtis v. United States, 5th Cir. 1930, 38 F. 2d 450, certiorari denied 281 U. S. 768, 50 S. Ct. 467, 74 L. Ed. 1175; United States v. Hopkins, D.C.S.D. Fla. 1923 290 F. 619. Count three is therefore dismissed."

Petitioner contends that the Court (Byers, J.) used evidence upon this trial that had been suppressed by Order of Judge Abruzzo, in violation of his rights under the Fourth Amendment of the Constitution of the United States, and that Judge Byers has acted as an appellate tribunal in the use of such evidence.

It is important to note that the evidence taken upon the hearing before Judge Abruzzo for an Order to suppress the evidence of the federal agents upon the ground that the petitioner's rights under the Fourth Amendment of the

Constitution of the United States have been violated was made, by stipulation a part of the record of the trial of petitioner before Judge Byers. All of the rulings made by Judge Abruzzo and his decision are binding upon Judge Byers.

Upon the hearing, the United States Attorney called the federal agents. They testified that they saw the sugar put upon the truck owned by petitioner on August 23, 1956. They further testified that they observed the petitioner drive the truck to various places and that on August 31, 1956 petitioner placed his truck in the C O M garage, 59th Street near Bay Parkway, Brooklyn, N. Y. That they kept the garage under observation and that on September 7, 1956 they entered the garage, seized the truck and removed the truck from said garage. That among other things, the truck contained 20,000 pounds of sugar. The federal agents did not have a warrant to enter the space rented by petitioner for the storage of his truck and property and search such space and the property contained therein.

The United States Attorney adduced all of this evidence to establish that the federal agents had probable cause and therefore did not need a search warrant.

The Court (Abruzzo, J.), stated "The proof has to show probable cause, • • •".

Judge Abruzzo, after hearing all the evidence wrote an opinion in which he reviews all the evidence adduced upon the hearing. This opinion, reads, in part:

> "The defendant's actions, to say the least, leave a suspicion that he bought the sugar for the purpose of using it for an illegal purpose. • • • Nevertheless, mere suspicion and possible probable cause is not sufficient for a search and seizure without a warrant. • • • The government agents undoubtedly could have seized the truck and its contents if they saw a crime being committed and might under some circumstances be permitted to search and seize the truck if they had

probable cause that a crime was being committed. * * * A search and seizure based solely on the ground of suspicion is not valid."

Not only did Judge Byers use the evidence that had heretofore been passed upon by Judge Abruzzo and held to be "suspicious" and insufficient to establish "probable cause" but the Court of Appeals in the *per curiam* opinion reverses the Order of Judge Abruzzo suppressing all the evidence adduced on the hearing of the motion to suppress.

The United States Attorney did not appeal the Order of Judge Abruzzo suppressing the evidence. Judge Byers knew of the Order suppressing the evidence. Upon the trial the following appears:

"Mr. Aronstein: Your Honor must bear in mind that all this testimony of these agents, all this evidence is evidence that was suppressed.

The Court: I understand that the evidence was suppressed.

I am only concerned with what happened. The sale. The sugar. The dates involved. The testimony of the agents as to what they observed.

If we consider that which is before us, we have saved that much time; that's all." (Trial Record, p. 28)

In fact, the Court of Appeals, in the *per curiam* opinion, does not state that Judge Abruzzo's holding was contrary to law.

The Court of Appeals, in the *per curiam* opinion, states:

"In summary, then, the Government would seem to have offered proof of intended illegal use considerably stronger than that held sufficient for conviction in DeHart v. United States, 237 F. 2d 227 (4 Cir. 1956)."

An examination of *DeHart* v. *United States*, *supra*, will disclose that no motion was made to suppress the evidence, nor was any Order made to suppress the evidence in that case.

The Court of Appeals, in the *per curiam* opinion states:

> "Moreover, there is direct evidence that the sugar purchased on August 23 was intended for an illegal use. The truck into which the sugar was loaded was registered under a fictitious name. The sugar was purchased for cash without a bill of sale, and, one having become aware of government investigation, appellant sought bills of sale specifying a lower price than that actually paid by him."

Petitioner contends that Judge Abruzzo considered all of this evidence which was adduced on the hearing held before him. The decision of Judge Abruzzo, that upon all the evidence adduced at the hearing before him, the Government failed to establish "probable cause" is a decision deciding contentions identical in fact, law and application and on the principle of *stare decisis* is the law of this case. The Court of Appeals in the *per curiam* opinion states:

> "It is to be observed, however, that appellant was not charged with having violated any of the sections set forth in footnote 2, supra, but rather was charged with the possession of a single specified amount of sugar on a single specified date for an intended use which would violate several sections of Chapter 51 of the Internal Revenue Code."

Petitioner contends that he was charged with possession of the sugar, to quote verbatim from the Information:

> "That, on or about the 23rd day of August, 1956, within the Eastern District of New York, the defendant, James L. Skinner, did have and possess property * * *."

Under the allegation of the Information "that on or about the 23rd day of August, 1956," the Government could legally prove possession before or after this date.

Petitioner contends that the Court of Appeals takes the position that the only evidence that was suppressed by Judge Abruzzo is that on September 7, 1956, federal agents seized the sugar on the truck in the C O M garage. That all the other evidence, the purchase of the truck, the purchase of the sugar, moving the truck containing the sugar from place to place between August 23 and August 31, 1956; the storage of the truck in the C O M garage on August 31, 1956 up until September 6, 1956, the day before the seizure, establishes the guilt of petitioner beyond a reasonable doubt. But as is pointed out, all of this evidence was adduced upon the hearing before Judge Abruzzo. All of this evidence was carefully considered by Judge Abruzzo, and after due consideration, Judge Abruzzo decided that the Government did not establish "probable cause."

The Court of Appeals, in the *per curiam*, incorrectly states the evidence wherein it says:

"* * * and, once having become aware of government investigation, appellant sought bills of sale * * *."

The evidence with respect to the obtaining of the bill is quoted verbatim (Testimony of Petitioner Skinner):

"By Mr. Aronstein:

Q. And the only reason you asked for a bill in this case is you knew you were going into Court to establish ownership of these two-hundred bags of sugar; is that right. A. That is right.

Q. And I requested you to get this bill? A. That is right." (Trial Record, pp. 302-303).

This testimony of petitioner is corroborated by the testimony of Joseph Krain, a witness called by the Government:

"The Court: In other words, if he got the load of sugar back, that the agents seized, you are ready to

take it off his hands at the same price that he paid? The Witness: Yes, sir, and he had asked us for a receipted bill for the load that was seized stating that his attorney wanted the bill." (Trial Record, p. 264).

Krain testified that the conversation with respect to the bill took place about September 7, 1956 after the federal agents seized the sugar.

In the case of *John Patrick Henry* v. *United States* (case No. 17, October Term 1959, not yet officially reported), the Court said:

> "* * * We then turn to the question whether prudent men in the shoes of these officers (Brinegar v. United States, supra, at 175) would have seen enough to permit them to believe that petitioner was violating or had violated the law. We think not. * * *"

In the case at bar Judge Abruzzo decided that the agents acted without probable cause and without a warrant to search and seize.

Petitioner respectfully submits that the foregoing petition alleges good and sufficient reasons for the allowance of a writ of certiorari.

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Court to the United States Court of Appeals for the Second Circuit to review its judgment affirming the judgment of conviction had against him in the District Court of the United States, Eastern District of New York, on or about March 13, 1958.

Respectfully submitted,

JAMES L. SKINNER,
Petitioner *Pro se*.

Appendix "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Criminal No. 45025

January 14, 1958

UNITED STATES OF AMERICA

v.

JAMES L. SKINNER,

Defendant.

Cornelius J. Wickersham, United States Attorney, Eastern District of New York, Attorney for United States; L. Donald Jaffin, Assistant, United States Attorney, of Counsel.

Joseph Aronstein, Attorney for the Defendant.

ABRUZZO, D. J.

The defendant has moved under Rule 41 (e) of the Federal Rules of Criminal Procedure for an order to suppress evidence illegally obtained and for a further order for the return of a Ford Truck; 200 bags, 100 lbs. each, of sugar; and various papers, tools and other articles seized on September 7, 1956, by the Alcohol Tax Division of the Treasury Department of the United States. Because the affidavits submitted in support of the motion and those submitted in opposition thereto were incomplete and inadequate, the motion was denied and a hearing ordered.

An information was filed against the defendant charging him with having in his possession 20,000 lbs. of sugar in

violation of Chapter 51, Title 26, U.S.C. (26 U.S.C.A. 5686 (b)). A proceeding is pending on the civil side seeking the forfeiture of the property referred to herein (*United States v. One 1951 Ford 2½ Ton Van Type Truck*, etc., Index No. M-2085).

The information against this defendant reads as follows:

> That on or about the 23rd day of August, 1956, within the Eastern District of New York, the defendant, JAMES L. SKINNER, did have and possess property, to wit, 20,000 pounds of sugar, with intent to use the said sugar in violation of Chapter 51, Title 26, United States Code. (26 USC 5686(b)).

The testimony in this matter discloses the following facts:

The defendant on various occasions purchased loads of sugar from Joseph Krain and another, trading under the name of Arrow Trading Company at their place of business in Brooklyn, New York. Cash payments were made by the defendant each time he made such a purchase. No receipts were given to the defendant nor records kept by Arrow. The defendant testified that he purchased this sugar for resale to one Joseph Abrams. He did not know the nature of Abrams' business, nor his address, but did have a phone number where he could contact Abrams. Abrams would contact the defendant and ask him to procure a load of sugar. The defendant would then call Arrow and make arrangements for the purchase. Abrams would then contact defendant again and would tell the defendant where they were to meet so as to transfer the sugar to Abrams' truck and receive payment. The defendant made a profit of 25 cents per bag.

On August 23, 1956, he purchased 200 bags of sugar for which he paid $1,900 in cash. He loaded the sugar in a Ford truck and drove the truck and its contents to a

friend's garage in Long Island City. The following morning he drove it to Newark, New Jersey, where he maintained a scaffolding business and left it in a parking lot for a day or two. He thereafter drove it to his sister's farm in Staten Island, New York, and left it there. He received a telephone call from Abrams who asked the defendant to meet him at 60th Street and Avenue N, Brooklyn, New York, but Abrams did not appear. He drove the truck to the C.O.M. Garage at 2232 59th Street, Brooklyn, parked it in front of the garage over night, and the following day, August 31, 1956, rented storage space in the garage for the truck. On September 7, 1956, the truck was seized by agents of the Alcohol Tax Unit of the Treasury Department who gave the garage owner a receipt for the truck but not for its contents.

The defendant testified that the truck was purchased and registered in the name of a fictitious person and a fictitious address given. He also testified that he gave his brother-in-law, now deceased, money with which to purchase the truck but never instructed him to purchase or register the truck under an assumed name, or give a false address, and that he did not know that this had been done until his brother-in-law delivered the truck and gave him the certificate of ownership and the plates. The truck was not re-registered in defendant's name.

Defendant has a criminal record and is presently under indictment in New Jersey for conspiracy.

The owner of the C.O.M. Garage testified that at the request of government agents he permitted several agents to "pose" as workmen in his garage for several days prior to September 7th when they seized the truck.

The Government produced evidence that after the defendant drove his truck from Newark, the premises at which it had been stored were raided and a large unregistered still found in the building together with sugar, raw alcohol and empty sugar bags. None of defendant's sugar ad-

mittedly was delivered to this unregistered still. It was stipulated at the hearing that the government agents kept defendant's truck under surveillance for ten days and that at the time it was seized the agents did not have a search warrant.

The defendant's actions, to say the least, leave a suspicion that he bought the sugar for the purpose of using it for an illegal purpose. His past record and his actions strongly indicate this conclusion. Nevertheless, mere suspicion and possible probable cause is not sufficient for a search and seizure without a warrant. In view of the fact that the Newark premises contained an unregistered still, a search and seizure at the time of the raid might possibly have been sustained. The government agents undoubtedly could have seized the truck and its contents if they saw a crime being committed and might under some circumstances be permitted to search and seize the truck if they had probable cause that a crime was being committed.

The Fourth Amendment forbids any search that is unreasonable and is construed liberally to safeguard the right of privacy. As was said in *United States* v. *Lefkowitz*, 285 U. S. 452 (p. 464):

> Its protection extends to offenders as well as to the law abiding. * * * Security against unlawful searches is more likely to be attained by resort to search warrants * * *.

In this Circuit it has been held that a search and seizure of property in premises not a dwelling without a warrant was unreasonable and illegal where federal officers had abundant opportunity to obtain one. *In re Milburne*, 77 F. 2d 310, 311; *United States* v. *Edelson*, 83 F. 2d 404. Having kept defendant's truck under surveilance for ten days, the agents should have obtained a warrant because they had more than ample time to do so.

Appendix "A"

It is admitted and conceded that the search and seizure was not made in connection with any lawful arrest. A search and seizure based solely on the ground of suspicion is not valid. *United States* v. *Edelson, supra.*

Only the motion to suppress the evidence resulting from the search and seizure is granted.

The second phase of the motion seeks an order returning the truck and sugar. On October 31, 1956, a motion was made for exactly that relief and it was granted upon condition that the defendant file a bond in the sum of $1,000. The records indicate that he has not complied with that order.

In view of the fact that the defendant did not comply with the order made pursuant to the motion of October 31, 1956, and that a proceeding is pending on the civil side seeking the forfeiture of this property, which is still pending and undetermined, this part of the motion made by the defendant cannot be granted at this time.

ABRUZZO,
U. S. D. J.

Appendix "B"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 81—October Term, 1959.

(Argued October 7, 1959 Decided December 8, 1959.)

Docket No. 25143

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES L. SKINNER,

Appellant.

Before:

LUMBARD, WATERMAN and FRIENDLY,

Circuit Judges.

Appellant was convicted for having violated 26 U. S. C. 5686(b), United States District Court for the Eastern District of New York, Byers, *J.*, sitting without jury. Affirmed.

CORNELIUS W. WICKERSHAM, JR., U. S. Attorney, Eastern District of New York (L. Donald Jaffin, Asst. U. S. Attorney, of counsel), Brooklyn, N. Y., *for Appellee.*

JOSEPH ARONSTEIN, New York City, *for Appellant.*

Appendix "B".

PER CURIAM:

Appellant was convicted of violating 26 U. S. C. 5686(b)[1] in that he possessed ten tons of sugar intended for use in the illegal manufacture of alcohol.[2] The case was heard in the District Court for the Eastern District of New York before Judge Byers, sitting without a jury.

Upon appeal appellant's first contention relates to the form of the information. As originally filed on May 29, 1957, it merely charged a violation of 26 U. S. C. 5686(b). Since section 5686(b) declares it to be a crime to possess property intended for use in violation of any section of Chapter 51 of Title 26 of the U. S. Code or any regulation prescribed thereunder, the district court indicated that the information might be defective under Rule 7(c) of the Federal Rules of Criminal Procedure because it failed to specify the particular sections of Chapter 51 that the intended use of the sugar would violate. The court, however, did not dismiss the information but permitted amendment under Rule 7(c) so as to enumerate the four sections which are set forth in footnote 2, *supra*. Appellant contends that the amended information charges four crimes instead of the single crime charged in the original information, thereby improperly enlarging the original charge as well as violating the requirement of Rule 8(a) that separate offenses be stated in separate counts. It is to be observed, however, that appellant was not charged with having violated any

[1] Now 26 U. S. C. 5686(a) by virtue of the Act of September 2, 1958, 72 Stat. 1411.

[2] The judgment of conviction stated that the sugar was intended for use in violation of Sections 5174(a)[2], 5180, 5009, and 5216 of Title 26 of the U. S. Code. These sections relate respectively to registration of stills and distilling apparatus, publicizing registration by signs on the premises, distillation operations without the posting of bond, and fermentation of various ingredients in an unauthorized distillery.

of the sections set forth in footnote 2, *supra*, but rather was charged with the possession of a single specified amount of sugar on a single specified date for an intended use which would violate several sections of Chapter 51 of the Internal Revenue Code. We hold that the amended information charged a single offense.

Second, appellant contends that the district court erred in relying upon evidence which had been illegally seized by the Government, and that, absent this evidence, sufficient proof against appellant was lacking. As indicated in the preceding paragraph, conviction under section 5686(b) requires proof of two matters: (1) possession of property, (2) intention that the property be used in violation of any section of Chapter 51. As to the first, the information charged appellant with the possession of ten tons of sugar on August 23, 1956. This was sufficiently proved by the unchallenged testimony of Joseph Krain of the Arrow Trading Company who sold the sugar to appellant on the above date and who watched it being loaded into appellant's truck. A government agent supplied corroborating testimony. As to the second, whether the property was intended for use in violation of sections of Chapter 51, there was substantial evidence to demonstrate that intent. Appellant was in the contracting and scaffolding business and he lacked a plausible explanation for the use to which this sugar was intended; he did not account satisfactorily for the disposition of five similar purchases made in the previous two months; a truck belonging to him was used in the operation of an illegal distillery discovered by a government raid in July 1956 and the truck into which appellant loaded the sugar purchased on August 23 was also connected to this illegal distillery. True, this evidence relates to occurrences prior to August 23. But this evidence is relevant as tending to prove a continuing pattern of conduct. Moreover, there is direct evidence that the sugar

purchased on August 23 was intended for an illegal use. The truck into which the sugar was loaded was registered under a fictitious name. The sugar was purchased for cash without a bill of sale, and, once having become aware of government investigation, appellant sought bills of sale specifying a price lower than that actually paid by him. In summary, then, the Government would seem to have offered proof of intended illegal use considerably stronger than that held sufficient for conviction in *DeHart* v. *United States*, 237 F. 2d 227 (4 Cir. 1956). All of this evidence was untainted by the illegal search and seizure which occurred on September 7, 1956 when, in a Brooklyn garage, government agents without warrant seized the truck appellant had used on August 23 to haul away the purchased sugar. A motion to suppress the evidence resulting from this illegal search and seizure was granted by Judge Abruzzo on February 5, 1958. Appellant has pointed to no instance where evidence suppressed by Judge Abruzzo was used in appellant's trial. The fact that suppressed evidence, if admitted, would tend to prove certain matters does not prevent the introduction of evidence, untainted by the illegal search and seizure, that tends to prove the same matters.

Judgment affirmed.

Appendix "C"

SUPREME COURT OF THE UNITED STATES

No. ..... October Term, 1959

JAMES L. SKINNER,

Petitioner,

v.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 14th, 1960.

(S) JOHN M. HARLAN,
Associate Justice of the Supreme Court
of the United States.

Dated this 5th day of January, 1960.

Appendix "D"

Section 5174-(a), Title 26, Chapter 51, United States Code.

REQUIREMENT: Every person having in his possession or custody, or under his control, any still or distilling apparatus, set up, shall register such still or apparatus with the Secretary or his delegate immediately on its being set up, by subscribing and filing with the Secretary or his delegate a statement, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; provided that stills or distilling apparatus not used or intended to be used for the distillation, redistillation, or recovery of distilled spirits are not required to be registered under this section.

Appendix "E"

Section 5180—Sign required on premises.

(a) REQUIREMENT: Every person engaged in distilling shall in such manner and form as the Secretary or his delegate may by regulations prescribed, place and keep conspicuously on the outside of the place of such business a sign, exhibiting in plain and legible letters the name or firm of the distiller with the words: "registered distillery."

(b) PENALTY: For penalty relating to failure to post sign or improperly posting such sign, see section 5681.

Appendix "F"

SECTION 5216: MASH, WORT AND VINEGAR: VINEGAR FACTORIES.

(a) GENERAL.

(1) No mash, wort or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building, or on any premises other than a distillery duly authorized according to law; and no mash, wort or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person, other than an authorized distiller, shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol in manufacturing vinegar or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery and (except in the case of vinegar) the tax thereon paid or determined as provided by law. Nothing in this section shall be construed to apply to fermented liquors, or to fermented liquids used for the manufacture of vinegar exclusively. But no worm, goose-neck, pipe, conductor, or contrivance of any description whatsoever whereby vapor might in any manner be conveyed away and converted into distilled spirits, shall be used or employed or be fastened to or connected with any vaporizing apparatus used for the manufacture of vinegar; nor shall any worm be permitted on or near the premises where such vaporizing process is carried on. It shall be lawful for manufacturers of vinegar to separate, by a vaporizing process, the alcoholic property from the mash produced by them, and condense the same by introducing it into the water or other liquid used in making vinegar.

(2) No person, however, shall remove or cause to be removed, from any vinegar factory or place where vinegar

is made, any vinegar or other fluid or material containing a greater proportion than 2 percent of proof spirits.

(3) Section 5196(b), (c) and (d) shall apply to all premises on which vinegar is manufactured and to all manufacturers of vinegar and their workman or other persons employed by them.

(4) Notwithstanding paragraph (1) when authorized by regulations prescribed by the Secretary or his delegate, fermented material may be removed from a distillery before being distilled if made and fermented in carrying on a business (other than distilling) authorized by regulations prescribed under Section 5151(a).

(b) PENALTY

For penalty for violation of subsection (a), see section 5608.

Appendix "G"

Section 5606—Penalty and forfeiture for distilling without giving bond.

Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not more than $5000, and imprisoned not more than 2 years. All distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found

in the distillery, or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person, who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard or inclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States. Aug. 16, 1954, 9:45 A.M. E.D.T. C 736, 68 A Stat. 684.

Appendix "H"

Title 26, United States Code, Section 5686(b), Chapter 51.

PENALTY FOR HAVING, POSSESSING OR USING LIQUOR OR PROPERTY INTENDED TO BE USED IN VIOLATING PROVISIONS OF THIS CHAPTER. It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this chapter, or regulations prescribed thereunder, or which has been so used, and every person so having or possessing or using such liquor or property, shall be liable to a fine not to exceed $5,000, or to imprisonment for not more than 1 year, or both.

Appendix "I"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

ORDER

Criminal No. 45025

UNITED STATES OF AMERICA,

against

JAMES L. SKINNER,

Defendant.

At Brooklyn, New York, in the said District on the 5th day of February, 1958.

The defendant having moved this Court by Notice of Motion dated June 3, 1957, for an order suppressing the use in evidence against him of one 1951 Ford 2½ ton van-type truck, serial No. FSEHM 35533, two hundred bags, one hundred pounds each of Sucrest Sugar and various papers, tools and other articles seized by Agents of the Alcohol and Tobacco Tax Division, Internal Revenue Service, on September 7, 1956, from a garage located at 2232 59th Street, Brooklyn, New York, and said motion having duly come on to be heard before me on the 19th day of June, 1957, and a hearing having been held and evidence taken on the 25th day of September, 1957, and the defendant having appeared by Joseph Aronstein, Esquire, in support of the motion and the United States of America having appeared by Cornelius W. Wickersham, Jr., L. Donald Jaffin, Assistant United States Attorney, of Counsel, in

opposition thereto; and upon reading the affidavits submitted in support of and in opposition to the motion, and the minutes of the hearing had herein, and upon making and filing a decision herein on January 14, 1958,

Now, on Motion of Cornelius W. Wickersham, Jr., it is

ORDERED, that the defendant's motion is granted, and the use of evidence resulting from the unlawful search and seizure is suppressed, and the United States of America is prohibited from using any evidence resulting from the illegal search and seizure against the defendant.

/s/ MATTHEW T. ABRUZZO,
U. S. D. J.

Appendix "J"

ORIGINAL INFORMATION

The Information filed May 29, 1957, reads:

"That on or about the 23rd day of August, 1956, within the Eastern District of New York, the defendant, James L. Skinner, did have and possess property, to wit, 20,000 pounds of sugar, with intent to use the said sugar in violation of Chapter 51, Title 26, United States Code (26 USC 5686 (b))."

Appendix "K"

THE AMENDED INFORMATION

The amended information reads in full as follows:

THE UNITED STATES ATTORNEY CHARGES:

That on or about the 23rd day of August, 1956, within the Eastern District of New York, the defendant, James L. Skinner, did have and possess property, to wit, 20,000 pounds of sugar, intended for use in violation of Sections 5174(a), 5180, 5606 and 5216 of Chapter 51, Title 26, United States Code (26 USC 5686(b)).

FILE COPY

FILED
FEB 11 1960
JAMES R. BROWNING, Clerk

No. 644

In the Supreme Court of the United States

OCTOBER TERM, 1959

JAMES L. SKINNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM R. WILKEY,
Assistant Attorney General,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 24-27; R. 335-338) is not yet reported. The opinion of the district court on the motion to suppress evidence (Pet. App. 19-23; R. 306-310) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1959 (R. 339). On January 5, 1960, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including

January 14, 1960 (Pet. App. 28), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly permitted the amendment of an information charging illegal possession of sugar intended for use in violating a designated chapter of the Internal Revenue Code, to specify particular subsections of that chapter that the intended use would violate.

2. Whether petitioner's conviction rested on evidence that had been suppressed prior to trial.

STATUTE AND RULE INVOLVED

26 U.S.C. (1952 Ed., Supp. V) 5686(b), 68A Stat. 700 (now 26 U.S.C. 5686(a), in slightly modified form, 72 Stat. 1411) provided as follows:

> It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this chapter, or regulations prescribed thereunder, or which has been so used, and every person so having or possessing or using such liquor or property, shall be liable to a fine not to exceed $5,000, or to imprisonment for not more than 1 year, or both.

Rule 7, Federal Rules of Criminal Procedure, provides in pertinent part as follows:

> * * * *
>
> (c) NATURE AND CONTENTS. The indictment or the information shall be a plain, concise and

definite written statement of the essential facts constituting the offense charged. * * *

* * * *

(e) AMENDMENT OF INFORMATION. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

* * * *

STATEMENT

Petitioner was convicted in a non-jury trial under an information charging that on August 23, 1956 he possessed 20,000 pounds of sugar, intended for use "in violation of Sections 5174(a), 5180, 5606 and 5216 of Chapter 51, Title 26, United States Code (26 U.S.C. 5686(b))" (Pet. App. 35; R. 314).[1] He was sentenced to six months' imprisonment (R. 321). The court of appeals affirmed in a *per curiam* opinion (R. 322, 335-339; Pet. App. 24-27).

Pertinent evidence may be summarized as follows:[2]

---

[1] As originally filed, the information charged that petitioner possessed the sugar "with intent to use the said sugar in violation of Chapter 51, Title 26, United States Code (26 U.S.C. 5686(b))," without specifying the particular subdivisions that the intended use would violate (Pet. App. 34). The information was amended at the beginning of the trial, at the court's suggestion and over petitioner's objection (Pet. App. 35; R. 314). Following the amendment, petitioner was granted a one-day continuance that he requested (R. 19-21).

[2] This includes evidence introduced at a hearing on a pretrial motion to suppress (*infra*, pp. 5-6). It was stipulated at the trial that such evidence would be part of the record, subject to the right of either party to supplement it (R. 31, 25-28).

Between June 21 and August 23, 1956 petitioner purchased and picked up six 20,000-pound loads of sugar from the Arrow Trading Company in Brooklyn, New York (R. 32, 36, 258, 259). Mr. Krain, one of the Arrow partners, testified that petitioner said that he was storing the sugar for use after the summer "as the plant was closed and it was too hot to use the stuff" (R. 261-262). Krain asked petitioner what he meant by the word "plant," but received no reply (R. 262-263). In the first transaction on June 21, petitioner paid $1900 in cash without obtaining a receipt, and hauled the sugar away in an International truck bearing the name Walker (R. 36, 255-257, 194). In the other five hauls, the last on August 23, petitioner used a Ford truck bearing the name General Refractories. The payments were again in cash, and no receipts were obtained (R. 36, 181, 211, 193-194, 204, 259-260). Both the International truck and the Ford truck had been registered under fictitious names (R. 53-55, 72-74, 80, 95, 101-104).

On July 23, 1956 government agents observed the Ford truck [3] leaving a garage in Newark, New Jersey (R. 49, 50, 277-278). Using a search warrant, the agents raided these premises on July 25 and seized fermenting mash and an operating still which did not have a sign indicating that it was a registered distillery and for which a statutory bond had not been given (R. 51-53, 130-132, 278-279, 285). Parked near the distillery was the International

[3] Petitioner testified that he was the only one, so far as he knew, who drove his Ford truck (R. 229).

truck, loaded with 5 gallon cans of alcohol (R. 52, 146-148, 279-280).

The agents kept petitioner's Ford truck under surveillance after August 23, 1956, the date on which he picked up the last load of sugar (R. 293, 204, 263). He left it in a parking lot in Newark for several days, drove it to his sister's farm in Staten Island and on August 31 parked it in a garage in Brooklyn (R. 204-206, 209, 293). On September 7, 1956, government agents, acting without a warrant, seized the parked truck and its contents, which included 20,000 pounds of sugar, the certificate of registration for the truck, and a paid license fee receipt (Pet. App. 33; R. 294-296). Several days after September 7, petitioner obtained from the seller Krain a receipted bill for $1,800 ($1,000 less than the amount petitioner paid for the last load of sugar), pre-dated August 23, 1956 (R. 264-265, 272).

Petitioner filed a pre-trial motion to suppress the seized evidence (Pet. App. 19). After hearing (R. 180-305), the district court granted the motion, on the ground that the search and seizure without a warrant were unlawful (Pet. App. 19-23). The court entered an order prohibiting the United States "from using any evidence resulting from the illegal search and seizure against the defendant" (Pet. App. 34).

At the hearing on the motion to suppress, petitioner testified that he was in the scaffolding and contracting business in Newark (R. 183-185); and

that he purchased the sugar in order to sell it to one Joe Abrams for a profit of $50 on each sale (R. 195-196). Petitioner testified that he had seen Abrams about 50 times during the 10 years he had known him, but that he did not know Abrams' occupation, home address, office address, or telephone number (R. 199).

ARGUMENT

1. Contrary to petitioner's contention (Pet. 10-13), the district court properly permitted the information to be amended to specify the particular subsections of Chapter 51 of the Internal Revenue Code that the intended use of the sugar would violate. Such amendment was authorized by Rule 7(e) of the Federal Rules of Criminal Procedure, which sanctions the amendment of an information "at any time" before verdict or finding "if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

Both the original and the amended information charged only a single offense, namely, illegal possession of sugar in violation of 26 U.S.C. 5686(b). That section makes it illegal to possess any property "intended for use in violating the provisions of this chapter," i.e., Chapter 51 of Title 26. The original information charged that the sugar was intended for use "in violation of Chapter 51." The amendment merely specified four subsections of Chapter 51 that such use would contravene.[4] But by so specifying it

[4] These sections cover the requirement for registration of stills or distilling apparatus (5171(a)); requirement of a

did not, as petitioner argues (Pet. 11), charge "four specific and distinct offenses." For, as the court of appeals pointed out (Pet. App. 25-26), petitioner "was not charged with having violated any of the [sub]sections * * * but rather was charged with the possession of a single specified amount of sugar on a single specified date for an intended use which would violate several sections of Chapter 51 of the Internal Revenue Code." The specification of the four subsections did not convert the information into one charging four separate crimes. Cf. *United States* v. *Lennon*, 246 F. 2d 24, 27 (C.A. 2), certiorari denied, 355 U.S. 836; *Silkworth* v. *United States*, 10 F. 2d 711, 714 (C.A. 2), certiorari denied, 271 U.S. 664; *Whitcombe* v. *United States*, 90 F. 2d 290, 293 (C.A. 3), certiorari denied, 302 U.S. 759.

Petitioner has not shown that any of his substantial rights were prejudiced by the amendment. Petitioner was given the one-day continuance which he requested after the amendment (R. 19-21).

2. Nor is there any basis for petitioner's contention (Pet. 13-18) that his conviction rested upon evidence that had been suppressed. The pre-trial order suppressed only the "use of evidence resulting from the unlawful search and seizure" of September 7, 1956 in which petitioner's Ford truck, the 20,000 pounds of sugar purchased in the last load on August 23,

---

sign for registered distilleries (5180); penalty for carrying on the business of a distiller without giving bond (5606); and prohibition of the fermentation of mash and other ingredients on any premises other than an authorized distillery (5216) (Pet. App. 29-32).

1956, the certificate of registration for the truck, and a paid license fee receipt were found (Pet. App. 34; R. 294-296). None of that evidence was introduced. Although the trial court relied on the testimony given at the pre-trial hearing to suppress, it did so pursuant to a stipulation, entered into at the beginning of the trial, that such testimony should be a part of the trial record (R. 31, 25-28, 121-123, 149). As the court below stated, "The fact that suppressed evidence, if admitted, would tend to prove certain matters does not prevent the introduction of evidence, untainted by the illegal search and seizure, that tends to prove the same matters" (Pet. App. 27).

The court below correctly held (Pet. App. 26-27) that, apart from the evidence ordered suppressed, the government adequately proved the two elements of the offense: "(1) possession of property, (2) intention that the property be used in violation of any section of Chapter 51." Petitioner's possession of the sugar on August 23, 1956 was shown by the testimony of the seller Krain. The intended illegal use of the sugar was amply established. The International and Ford trucks, both registered in fictitious names and used in hauling purchased sugar, were traced to an unregistered distillery. Petitioner obviously had no need for sugar in his scaffolding and contracting business and offered an unconvincing explanation of its intended use. Moreover, when petitioner learned of the government investigation, he resorted to the deceptive tactic of obtaining from the seller a pre-dated bill for the August 23rd load of sugar for an amount $1,000 less than he had paid

for it (see the Statement, *supra*). In its totality, the evidence clearly justified the finding that petitioner was guilty as charged. Cf. *DeHart* v. *United States*, 237 F. 2d 227 (C.A. 4); *United States* v. *One 1955 Mercury Sedan*, 242 F. 2d 429, 431 (C.A. 4).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 644

JAMES L. SKINNER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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IN THE

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Argument

1. Assuming, without admitting, that the Government's contention, namely, "the amended information merely specified four subsections of Chapter 51"; and therefore the amended information did not convert the information into one charging four separate offenses, then the original information was a good information since it merely specified 693 sections of Chapter 51 that the use of the sugar would contravene.

It is true, as the Court of Appeals pointed out in its opinion, that petitioner was not charged with having violated any of the [sub] sections. Petitioner never did make any such claim, either upon the trial or upon the appeal. Petitioner did claim and now claims that any prosecution under Section 5686(b) must allege in the information (1). Possession of * * * property, and (2) that it was intended for use in violation of a specific provision or regulation of Chapter 51.

Petitioner has not been able to find a reported case wherein the precise question has been passed upon. However, petitioner does believe that *Morgan* v. *Devine*, 237 U. S. 632, 641, supports his contention that the amended information in this case charges more than one offense in one count. In that case, this Court stated:

> "As to the contention of double jeopardy upon which the petition of habeas corpus is rested in this case, this court has settled that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by statutes. * * *"

(See also, *Gore* v. *United States*, 357 U. S. 386, 389).

Petitioner contends that an information that merely charged "possession of * * * property, to wit, sugar" would not charge an offense under Section 5686(b) of Chapter 51, U. S. C. The information to be a valid one must, in addition, charge an intent to be used in violation of a single specified provision or regulation of Chapter 51.

Petitioner contends, relying on his interpretation of the reasoning of this Court in *Morgan* v. *Devine* (*supra*), that unless the same evidence that would prove that he possessed the sugar with intent to use in violation of Section

5174(a) of Chapter 51 would also prove possession with intent to use in violation of Section 5180, and 5606, and 5216, then the amended information does charge four separate and distinct offenses.

A reading of Section 5174(a) together with a reading of Section 5180, 5606 and 5216, all of which are set forth in the petition heretofore filed, will disclose that the proof necessary to establish intent to possess the sugar to be used in violation of Section 5174(a) is entirely different from the proof required to establish intent to possess the sugar to be used in violation of Section 5180, or Section 5606, or Section 5216.

The District Court, Byers, J., ruled the original information defective and directed that the information be amended to specify the precise statute or regulation that the defendant (petitioner) is charged with violating.

Petitioner contends that the cases cited by the Government, *United States* v. *Lennon*, 246 F. 2d 24, 27 (C.A. 2); *Silkworth* v. *United States*, 10 F. 2d 711, 714 (C.A. 2), and *Whitcombe* v. *United States*, 90 F. 2d 290, 293 (C.A. 3) are not in point.

2. The Government contends that the order of Judge Abruzzo suppresses "the use of evidence resulting from the unlawful search and seizure" of September 7, 1956 in which petitioner's Ford Truck, the 20,000 pounds of sugar purchased in the last load on August 23, 1956, the certificate of registration for the truck, and a paid license fee receipt were found. That none of that evidence was introduced.

The Government's brief in opposition is completely silent with respect to the doctrine of res judicata forcefully presented in petitioner's brief in the Court of Appeals.

The doctrine of res judicata was squarely presented to the Court of Appeals. The closing paragraph of the

brief in the Court of Appeals states:

> "As heretofore stated, the testimony adduced at the hearing before Judge Abruzzo embraced all of the above evidence. All of this evidence was suppressed and the Government was prohibited from using such evidence in any manner whatsoever. The opinion of Judge Abruzzo characterizes all of this evidence as merely suspicious. Judge Byers, in the use of this evidence on the trial had before him, committed error. Judge Byers is bound by the opinion and decision of Judge Abruzzo."

The Government admits the trial court relied on the testimony given at the pre-trial hearing to suppress, but that the stipulation permitted the trial court (Byers, J.) to again consider the same evidence adduced upon the hearing before Judge Abruzzo, without regard to any rulings, opinion or decision made by Judge Abruzzo.

Petitioner contends that the Government's interpretation of the stipulation is erroneous. The stipulation was not reduced to a formality, i.e., it was not made in writing, signed by both attorneys and approved by the Court. In fact, Judge Byers, at page 30, Trial Record, stated:

> "I said the record made before Judge Abruzzo is stipulated to be part of the record of this trial, reserving to either party the right to supplement that testimony."

Petitioner contends that the record made before Judge Abruzzo, with or without the stipulation, is a part of the record of the trial. If the decision on the motion to suppress was adverse to petitioner, the order denying suppression could be appealed by petitioner. This motion was interlocutory and being made after the filing of the information was a part of the trial record. (*United States* v.

Dilli, 2 Cir. 1947, 159 F. 2d 818, 820, aff'd 332 U. S. 581, 68 S. Ct. 222, 92 L. Ed. 210; *Carroll v. United States*, 354 U. S. 394, 404.)

The Government in the brief in opposition to this petition takes a different position from the Court of Appeals with respect to the evidence used upon the trial. The Court of Appeals, in the *per curiam* opinion states:

> "Appellant has pointed to no instance where evidence suppressed by Judge Abruzzo was used in appellant's trial. * * *"

In the Government's brief it is stated:

> "Although the trial court relied on the testimony given at the pre-trial hearing to suppress, it did so pursuant to a stipulation, entered into at the beginning of the trial, that such testimony should be a part of the trial record" (R. 31, 25-28, 121-123, 149).

The Government's position before this Court is that the Court of Appeals erroneously decided that Judge Byers did not use evidence that was suppressed by Judge Abruzzo. That Judge Byers correctly used testimony adduced at the pre-trial hearing before Judge Abruzzo, which testimony is the basis for Judge Abruzzo's opinion and decision. That the stipulation entered into between the United States Attorney and the attorney for petitioner gave Judge Byers the right to again consider all the testimony adduced upon the pre-trial hearing before Judge Abruzzo. It gave Judge Byers the right to independently rule, without regard to Judge Abruzzo's rulings, opinion and decision, upon all of the testimony. This is contrary to the ruling of Judge Byers. Judge Byers ruled that he could again use the same testimony since petitioner did not move to strike this testimony at any time during or after the hearing before Judge Abruzzo and that Judge Abruzzo did not, of his own motion, strike out all the testimony.

Petitioner respectfully calls the attention of this Court to page 28, wherein the following appears:

"Mr. Aronstein: Your Honor must bear in mind that all this testimony of these agents, all this evidence is evidence that was suppressed.

The Court: I understand that the evidence was suppressed."

Petitioner contends that the aforesaid clearly demonstrates that the stipulation did not again permit Judge Byers to receive the evidence adduced upon the hearing before Judge Abruzzo and disregard Judge Abruzzo's opinion and decision upon the motion to suppress.

Petitioner urges that the fact that Judge Byers erroneously construed the order of Judge Abruzzo does not mean that petitioner stipulated that the evidence taken on the pre-trial hearing could again be used by Judge Byers upon the trial without respect to Judge Abruzzo's opinion and order. The following appears at pages 36-38 of the trial record:

"Mr. Aronstein: I move to strike out the evidence with respect to October 23rd on the ground that has been suppressed.

The Court: October?

Mr. Aronstein: No, on August 23rd.

The Court : August 23rd?

Mr. Aronstein: On the ground that evidence has been suppressed.

The Court: Evidence has been suppressed, but the testimony hasn't been directed to be stricken.

Oh, no. Motion denied.

• • •

The Court: Well, let me see. I have the order here. The opinion says only the motion to suppress the evidence resulting from the search and seizure is granted.

This isn't testimony resulting from the search and seizure. Motion denied.

Mr. Aronstein: Exception."

Petitioner contends that Judge Byers, in ruling that Judge Abruzzo merely suppressed the evidence but the testimony adduced upon the pre-trial hearing was not stricken by petitioner by appropriate motion and therefore, all such testimony can again be used by the Government upon the trial, either by again having the witnesses testify upon the trial or by reference to the testimony given upon the pre-trial hearing, and that Judge Byers can now, at the trial, decide questions of fact, the very same questions of fact that were decided by Judge Abruzzo in favor of petitioner, and decide these questions of fact in favor of the Government.

The fallacy of the ruling of Judge Byers is self evident. If the ruling is correct then petitioner would be required, after the motion on the pre-trial hearing was decided, to make a motion to re-open the hearing, then move to strike out all the testimony adduced upon the hearing, excluding the physical exhibits, which, according to the ruling of Judge Byers, have been suppressed. If Judge Abruzzo denied the motion to re-open the hearing or if the hearing was re-opened and Judge Abruzzo denied the motion to strike out all the oral testimony adduced upon the hearing, then the Government could again use this evidence upon the trial. Judge Byers then could pass upon the same questions of fact and law that were passed upon by Judge Abruzzo and make different findings of fact and law in favor of the Government.

Judge Byers is confused with respect to the meaning of evidence. Testimony is evidence that is legally submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of fact under investigation. (The Consolidated Webster Encyclopedic Dictionary; Evidence.)

Petitioner urges that this ruling of Judge Byers is contrary to the ruling of this Court in *Steele* v. *United States, No. 2*, 267 U. S. 505, 507, 510-511. In *Steele* v. *United States, No. 2*, *Steele*, upon the trial, sought to have submitted to the jury the testimony of Agent Einstein, that was the basis for securing the search warrant, with instructions to the jury by the Trial Court, that if the jury found that the testimony of Agent Einstein, i.e., that he observed the name "whiskey" stenciled on cases brought into the premises, and that he ascertained by his own investigation that there was no permit for the legal storage of whiskey on those premises did not constitute probable cause, the jury should ignore the evidence resulting from the search and seizure and acquit the defendant. This Court held, at page 507:

> "The refusal to vacate the search warrant and to return the liquor seized was a final decree. The question is therefore res judicata as against him."

This Court, further said, at pages 510-511:

> "* * * The second answer is that the question of the competency of the evidence of the whiskey by reason of the legality or otherwise of its seizure was a question of fact and law for the Court and not for the jury. * * *"

Petitioner concedes that Judge Byers, with or without the stipulation, would have the right to scrutinize the testimony and the exhibits adduced at the hearing before Judge Abruzzo to ascertain exactly what testimony and exhibits had already been received and passed upon by Judge Abruzzo. Judge Byers, petitioner assumes, could do this by reference to the record of the proceedings before Judge Abruzzo or by having the same witnesses testify and the same exhibits received upon the trial. But whichever procedure is followed by Judge Byers, he is

bound by the rulings, opinion and decision of Judge Abruzzo. Whatever rulings on the law and the facts, whatever opinion and decision was made by Judge Abruzzo is absolutely binding upon Judge Byers. (*Steele v. United States, supra.*)

Petitioner respectfully calls the attention of this Court to P. 8, Government's brief in opposition, wherein it states:

> "Moreover, when petitioner learned of the goverment investigation, he resorted to the deceptive tactic of obtaining from the seller a pre-dated bill for the August 23rd load of sugar for an amount $1,000 less that he had paid for it. * * *"

The Government is in error with respect to the above statement. 1. Petitioner did not resort to any deceptive tactics. He secured the paid bill after the agents seized his truck and the sugar at the request of his lawyer so that he could establish ownership of the sugar, a necessary allegation on the various motions made by petitioner long before any criminal prosecution was instituted by the Government on the civil side of the Court.

The statement in the Government's brief in opposition that petitioner "deceptively obtained a pre-dated bill" is erroneous. Petitioner purchased the sugar on August 23rd, 1956. At the time of the purchase he did not obtain a paid bill. After the Government agents seized the sugar on September 7th, 1956, petitioner went to the sellers and told them he needed a paid bill in order to establish ownership in a proceeding on the civil side of the Court. The bill was not pre-dated. It was dated the same day the sugar was purchased and paid for. Furthermore, petitioner did not secure a bill in an amount $1,000 less than he paid for the sugar. Petitioner testified he paid $1,800 and Krain testified he paid $1,900 a difference of only $100 (pp. 264, 302-303; Trial Record).

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ of certiorari should be granted.

JAMES L. SKINNER,
Petitioner, *pro se.*